

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





# 77-1034

To be argued by:  
Louis A. Somma

77-1034 & 1040

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,  
  
Plaintiff-Appellee,  
  
-against-  
  
PASQUALE PICCIRILLO,  
  
Defendant-Appellant.

Bgs

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ON APPEAL FROM THE JUDGMENT OF THE  
UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF NEW YORK

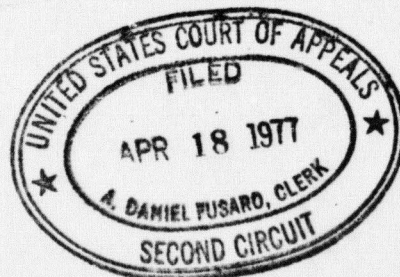
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BRIEF OF THE DEFENDANT-APPELLANT

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Docket No. 77-1034  
Docket No. 77-1040

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## TABLE OF CONTENTS

	Page
Preliminary Statement .....	1
The Issues on Appeal .....	3
Statement of the Case .....	4
POINT I    DEFENDANT PASQUALE PICCIRILLO ESTABLISHED THE DEFENSE OF ENTRAPMENT AS A MATTER OF LAW BY HIS UNCONTRADICTED AND UNREBUTTED TESTIMONY .....	10
POINT II    DEFENDANT PASQUALE PICCIRILLO ESTABLISHED THE DEFENSE OF ENTRAPMENT AS A MATTER OF LAW BY THE GOVERNMENT'S ADMISSION THAT IT PAID ITS INFORMER .....	12
POINT III   THE TRIAL COURT MISINSTRUCTED THE JURY CONCERNING THE FAILURE OF THE GOVERNMENT TO PRODUCE THE CONFIDENTIAL INFORMER .....	13
POINT IV    THE GOVERNMENT DID NOT OFFER EVIDENCE OF THE PREDISPOSITION OF DEFENDANT PASQUALE PICCIRILLO TO COMMIT THE CRIMES CHARGED ...	14
CONCLUSION .....	14



UNITED STATES COURT OF APPEALS  
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-----X  
UNITED STATES OF AMERICA, :  
Plaintiff-Appellee, :  
-against- : Docket No. 77-1034  
PASQUALE PICCIRILLO, : Docket No. 77-1040  
Defendant-Appellant. :  
-----X

BRIEF OF DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

The defendant Pasquale Piccirillo appeals from the judgment of the United States District Court for the Eastern District of New York, sentencing him to three years in jail and a fine of \$2,000.00, imposed by Judge Thomas C. Platt on January 13, 1977, after a trial before the court and jury which found him guilty of two counts of the indictment, namely, unlawfully engaging in the business of dealing in firearms and ammunition, being aided and abetted by Dominick Linarello, a federally licensed gun dealer, and, of the second count, unlawfully transferring a sawed-off shotgun, acting with Dominick Linarello, and said sawed-off shotgun not having been registered to either of them in the National Firearms Registration and Transfer Record.



The jury returned the verdict of guilty on November 17, 1977 and the same was duly entered by the court.

Defendant Pasquale Piccirillo and his wife Maria were indicted together with Carmine Mercogliano and Dominick Linarello in a three count indictment.

The first count charged that defendant Pasquale Piccirillo, his wife Maria Piccirillo, and Carmine Mercogliano unlawfully dealt with firearms and ammunition from May 13, 1975 to September 3, 1976, and were aided and abetted by Dominick Linarello, a federally licensed gun dealer.

The second count charged only defendants Pasquale Piccirillo and Dominick Linarello with the unlawful transfer of a firearm - a sawed-off shotgun.

The third count charged defendant Dominick Linarello with failing to make appropriate entries and properly maintain records in his business from April 5, 1976 to September 3, 1976 as a federally licensed gun dealer.

The case went to the jury on November 17, 1976 and the jury came back with a partial verdict the same day acquitting defendant Pasquale Piccirillo's wife Maria and defendant Carmine Mercogliano.

The jury convicted defendants Pasquale Piccirillo and Dominick Linarello of the first count of the indictment, and defendant Pasquale Piccirillo of the second count of the indictment; but the jury was at an impasse on count two as to defendant Dominick Linarello, and acquitted him of said count the next day.



The Issues on Appeal

- I. Has defendant Pasquale Piccirillo established the defense of entrapment as a matter of law by his uncontradicted and unrebutted testimony?

We contend that the answer is "Yes".

- II. Has defendant Pasquale Piccirillo established the defense of entrapment as a matter of law by the government's admission that it paid its informer?

We contend that the answer is "Yes".

- III. Did the trial court's instruction to the jury fail to correctly state, pursuant to defendant's request, that the failure of the government to produce the confidential informer as a witness could be taken by the jury that he would have testified adversely for the government and favorably for the defendant Pasquale Piccirillo?

We contend that the answer is "Yes", it did.

- IV. Was the evidence sufficient to sustain the jury's verdict on the government's burden of proof to establish the predisposition of defendant Pasquale Piccirillo to commit the crimes charged, under the trial court's instruction?

We contend that the answer is "No".



STATEMENT OF THE CASE

This is a gun case where the government was looking to discover and prosecute people involved in selling large quantities of firearms and ammunition.

While searching for a lead, the New York City Police Department (T. 293) provided one Frank Sogliuzzo as an informer (T. 55 & 67) who indicated that he could promote an introduction to people selling large quantities of guns. For his services he agreed to accept \$200.00 payable when an arrest would materialize (T. 300).

The first and practically only people Frank Sogliuzzo, the confidential informer, was able to contact for the government was the defendant Pasquale Piccirillo whom he had known as a pizzaman in Joe's Pizzeria located at 121 Fifth Avenue, Brooklyn, New York, where the informer used to "hang out" sometime before, under the assumed name Santorio. The informer had been barred from the premises because he had run up a telephone bill on the house telephone of more than \$100.00 by making calls to Puerto Rico, and he had refused to pay for them (T. 455). Consequently, "Santorio" was angry at the owner of the pizzeria and was seeking revenge.

When "Santorio" arrived on the premises to confront the owner, Umberto Romeo, who was related by marriage to the defendants Pasquale Piccirillo and Maria Piccirillo, his wife, he did not find him there. Mr. Romeo's son-in-law, Giovanni Russo, the brother of Maria Piccirillo, was in charge of the pizzeria, and was engaging in a telephone conversation with Pasquale Piccirillo. At that moment "Santorio" conceived



the plot to frame Pasquale Piccirillo, and managed to extract the home telephone number from Pasquale's brother-in-law Giovanni Russo (T. 457).

A few days later "Santorio", the confidential informer, took Special Agent Michael Zezima to the home of Mr. and Mrs. Piccirillo at 140 McKinley Avenue, Brooklyn, New York, and introduced the agent as "John", a good friend and a fellow countryman. Special Agent Zezima proceeded to act the part and establish himself as an Italian native by speaking Italian and by telling Pasquale and his wife that he came from Rome and was very familiar with the town of Caserta in Italy where Pasquale and his wife lived prior to their immigration to the United States. (T. 66-68, 468-470)

The record shows that Pasquale and his wife are simpletons. They are recent immigrants who do not speak English and are both employed as unskilled laborers. They have no more than a third grade elementary school education. They have two children and live in a house they recently bought after five years of accumulating money for a small down payment. They had never been arrested or convicted of any crimes. "Santorio", the confidential informer, and Special Agent Zezima were well received, and after establishing himself as a person who wanted to be close to another fellow countryman Special Agent Zezima asked Pasquale if he couldn't get a gun for him because he worked at Kennedy Airport late at night and needed it for self-protection. Pasquale told him that he did not have any but one of his neighbors, one Patsy Sorrentino, had mentioned some months previous that he wanted



to sell his personal gun. When Sorrentino returned from work at 9 P.M. Pasquale invited him to his home, but Patsy Sorrentino was not anxious to part with his personal gun at that time. He told Santorio and the Special Agent that perhaps he would do so a few days later. (T. 475-477)

Special Agent Zezima indicated his disappointment over the failure to obtain a gun from Patsy Sorrentino and inquired if Pasquale could not find him another gun. At this point Pasquale remembered that he had found a rusty old gun which didn't work in a hole above the kitchen cabinets of the house he had recently purchased. Pasquale showed it to Santorio and Special Agent Zezima, and both of them then insisted on having it and paying for it. Pasquale refused to take any money for it, but Santorio and Special Agent Zezima pressed him to accept money for it. Finally, they shamed him into accepting \$100 as a gift from one paisano to another. (T. 472-474, 554-561)

On May 16, 1975 Pasquale had his part time employer, Carmine Mercogliano, at his home for dinner when Santorio arrived with Special Agent Zezima to ask about the personal gun of Patsy Sorrentino. After Pasquale and his employer finished dinner they had to return to work in the office of Carmine Mercogliano. Michael Zezima and Santorio followed them to the office which was around the corner from Pasquale's house. Shortly thereafter Patsy Sorrentino on his way home from work passed the office and was beckoned to enter therein and at that point in time Santorio and Special Agent Zezima practically force him to make good his promise to sell his gun to Special Agent Zezima for \$125. (T. 476-478)



The record reveals that Santorio and Special Agent Zezima realize that Pasquale had no guns to sell and had no way of getting them, so they turn to Patsy Sorrentino and Carmine Mercogliano to look for large quantities of guns.(T. 476, 76-99, 795-812)

For the next eleven months there is a lot of communication going on between Special Agent Zezima and Carmine Mercogliano, with Pasquale being visited many times by Special Agent Zezima. However, during this period of time no transaction takes place.

Santorio and Special Agent Zezima expected to be led by Carmine Mercogliano to a source of supply for the purchase of hundreds of cases of guns and ammunition.

At this point in time Special Agent John Pitta, the Acting Group Supervisor of Special Agent Zezima, was disappointed in what had been accomplished to date. He decided to actively participate in the undercover operation.

Consequently, on April 5, 1976 Special Agent John Pitta went with Special Zezima to Pasquale's home to promote a sale of guns by acting as a member of the underworld.(T.493-496)

During the foregoing eleven month period Pasquale was harassed by Santorio as well as by Special Agent Zezima to look for large quantities of guns. Finally, Santorio, the confidential informer, became the source of supply, and by repeated threats directed Pasquale to pick up packages containing handguns from a hallway to the right of the Fulton Gun Shop, owned by Dominick Linarello, and place the money provided by the Special Agents in a mailbox.(T. 480-488)



Acting Group Supervisor John Pitta, acting as a "mafiosa", told Pasquale in a forceful manner that he wanted to buy all the guns that would be made available.

Santorio, the confidential informer, avails himself of the opportunity to make a profit by carefully manipulating both sides of the "business transaction", i.e., the illegal sale of guns and ammunition to the government.

"Little" Pasquale is being used by Santorio as an intermediary for the sale of guns to the Special Agents, and Pasquale is repeatedly warned that he will be killed and his house fire-bombed if he doesn't follow Santorio's instructions. Prior to each and every transaction Pasquale is warned that the role of Santorio, the confidential informer, should never be revealed. On the other hand, the Special Agents, acting as members of the underworld repeatedly threaten harm to Pasquale and his family in order to bring about the purchase of guns. From April 5, 1976 to the date of his arrest Pasquale became a victim of circumstances in his role as an unwilling intermediary between Santorio, the confidential informer, and the Special Agents. (T. 480-488, 595-631)

On July 27, 1976 the Special Agents promoted the introduction to Dominick Linarello by Pasquale in front of Linarello's pizzeria to the left of the Fulton Gun Shop. (T. 629) The Special Agents pressured Pasquale to take them to that location because they kept insisting that defendant Dominick Linarello was Pasquale's source of supply. At this point in time Dominick Linarello becomes a victim of circumstances, in spite of the fact that he is not connected with Santorio, the confidential informer, in any way whatsoever. The jury



acquitted Dominick Linarello of the alleged direct sale to Special Agent Pitta of the sawed-off shotgun under the second count of the indictment. However, Pasquale was convicted of said charge against the weight of the evidence. Pasquale, a common laborer, a simpleton, was (T. 313) used by the Special Agents and Santorio, the confidential informer, to build a case against a federally licensed gun dealer, Dominick Linarello, and Pasquale was entrapped in the web of contrivance, maliciously conceived and promoted by Santorio, the confidential informer, acting in concert with the Special Agents of the United States Government who allowed Santorio to disappear ten (10) days prior to trial when he was given \$200, the contingent fee (T. 300) for the arrest of the defendants, and was told that the defense would be looking to serve him with a subpoena so that he would be compelled to testify for the defense (T. 372)

Frank Sogliuzzo, the confidential informer, who was known to Pasquale Piccirillo as "Santorio" did not make himself available to the defense, having been forewarned by the Special Agents of The United States Government. He did not testify. Indubitably, his testimony would have been favorable to defendant Pasquale Piccirillo, and adverse to the government's case.

During the trial the United States Attorney stated on many occasions that he would not have Santorio, the confidential informer, as a witness for the prosecution. (T. 192 & T. 305)

However, at the eleventh hour there was a reversal of attitude by the Assistant United States Attorney trying

POINT I

DEFENDANT PASQUALE PICCIRILLO ESTABLISHED  
THE DEFENSE OF ENTRAPMENT AS A MATTER OF  
LAW BY HIS UNCONTRADICTED AND UNREBUTTED  
TESTIMONY

After testifying that he was incited and induced to engage in the sale of firearms by the confidential informer acting together with Special Agent Michael Zezima and later by the coercive tactics of Special Agent John Pitta, he told the Court and Jury that Frank Segliuzzo, known to him as Santorio (the admitted confidential informer of the government) was the actual supplier of the contraband firearms. He stated that the confidential informer was the prime mover who called him on the telephone, and then would direct him in each transaction, specifically telling him to go to a hallway located to the right of the Fulton Gun Shop where he would find packages containing firearms. He would according to the directions given to him by the confidential informer take the packages and place the moneys given him for the purchase by the Special Agent in one of the mailboxes on the premises and then deliver the packages to the Special Agent who had brought him into the vicinity of the gun shop in a car driven by another Special Agent. He further testified that the confidential informer told him to keep his mouth shut and not to reveal that he, the confidential informer, was the source of supplying the contraband firearms.



The facts of this case are analogous to U. S. v. Bueno, 447 F. 2d 903 (1971), U. S. v. Oquendo, 490 F. 2d 161 (1974), and U. S. v. Gomez-Rojas, 507 F. 2d 1213 (1975).

The Bueno case was the first Court of Appeals case to hold that "entrapment is established as a matter of law where a defendant is charged with possessing contraband or distributing it to a government agent if the contraband in question was supplied to the defendant by a government agent including a paid informer. We held in Bueno that when a defendant testifies that he obtained the contraband from an informer, the government must produce the informer to contradict the defendant's allegations in order to take the case to the jury. If the informer so testifies, then the jury must find beyond a reasonable doubt that the defendant did not obtain the contraband in question from the informer." (U. S. v. Oquendo, 490 F. 2d at pp. 162-163) (Emphasis added)

"Neither party produced the informer. If the informer's testimony would tend to disprove the defendant's story, it was up to the government to produce him. The defendant having testified to facts which establish a defense as a matter of law, the government has the duty to come forward with contrary proof, if it is to carry its ultimate burden of proving guilt beyond all reasonable doubt.



"Thus, we hold that the conviction on this record must be reversed and the case remanded for trial. If the government cannot come forward with evidence that contradicts defendant's testimony, then he is entitled to discharge as a matter of law." (U. S. v. Bueno, 447 F. 2d at p. 906) (Emphasis added)

"In a Bueno type case, however, the government's task is more difficult. It may not rely solely on the jury's decision to believe or not to believe the defendant's story. \*\*\* Since in many cases of this type of which Bueno is one, the only witnesses to the alleged entrapment are the defendant and the government agent or informer, the government must call the alleged supplier, its officer or its informer as a witness. (U. S. v. Gomez-Rojas, 507 F. 2d at p. 1218) (Emphasis added)

## POINT II

DEPENDANT PASQUALE PICCIRILLO ESTABLISHED  
THE DEFENSE OF ENTRAPMENT AS A MATTER OF LAW  
BY THE GOVERNMENT'S ADMISSION THAT IT PAID  
ITS INFORMER

Where the government makes a contingent arrangement for paying its informer an amount of money upon the completion of the informer's assignment on the contingency that it results in the arrest of the defendant, the defense of entrapment is established as a matter of law. (Williamson v. U. S. 311 F. 2d 441, cited in footnote in U. S. v. Oquiendo, supra)

In this case Special Agent John Pitta testified that the government had paid Frank Sogliuzzo, the confidential informer \$200 ten days before this trial. Such payment which



is unexplained by the confidential informer Frank Sogliuzzo leads to the inescapable inference that the payment was made contingent upon the arrest and imminent prosecution of the defendant Pasquale Piccirillo.

### POINT III

#### THE TRIAL COURT MISINSTRUCTED THE JURY CONCERNING THE FAILURE OF THE GOVERNMENT TO PRODUCE THE CONFIDENTIAL INFORMER

Since the record clearly indicates that the confidential informer was under the control of the Special Agents of the United States Government due to the fact that 10 days prior to the trial of this case he was available in their office for the payment of his contingent fee of \$200 and therefore could have been served a subpoena by the Assistant United States Attorney trying this case, it is apparent that the failure to make him available to testify at the trial should have been presented to the jury by the court who should have charged that the confidential informer should have been produced by the United States Attorney, and his failure to do so can be interpreted by the jury that the confidential informer would have testified adversely to the prosecution, and in favor of the defendant Pasquale Piccirillo.

This case is unlike the situation where "If the purported supplier is unavailable, however, as in our recent case of *United States v. Soto*, 5 Cir. 1974, 504 F. 2d 557, where the informer had died in the interim, the Government may defeat the defense of entrapment by otherwise demonstrating that the contraband came from a non-Government-related source. (*U. S. v. Gomez-Rojas*, 507 F. 2d at p. 1218) (Emphasis Supplied)



POINT IV

THE GOVERNMENT DID NOT OFFER EVIDENCE OF  
THE PREDISPOSITION OF DEFENDANT PASQUALE  
PICCIRILLO TO COMMIT THE CRIMES CHARGED

The Special Agents admitted on cross-examination that they did not have any evidence of the background of the defendant Pasquale Piccirillo to indicate any disposition on his part to engage in the business of dealing in guns and ammunition. They also admitted that they did not discuss the predisposition of defendant Pasquale Piccirillo to commit any crime, with the confidential informer, Frank Sogliuzzo, who was known to the defendant as "Santorio".

The record clearly shows that Santorio was using Pasquale as an instrument who was easily manipulated into a compromising position so that he could be pressured to act as an intermediary in the confidential informer's ploy to make a profit from the sale of guns to the Special Agents of the United States Government. In effect, the confidential informer who was hired by the government was selling guns to the Special Agents who initially were aided and abetted by the confidential informer to induce and seduce little Pasquale, the simpleton, to part with a rusty old gun he had found on his premises and who consequently became entrapped by the Special Agents as well as by the confidential informer to do their bidding in order to avoid physical harm to himself and his family.

CONCLUSION

For the foregoing reasons the judgment of conviction against Pasquale Piccirillo should be reversed and the indictment



dismissed.

April 11, 1977

Respectfully submitted,

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